IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs November 24, 2009 at Knoxville

STATE OF TENNESSEE v. GARY MOSES BROWN

Appeal from the Circuit Court for Bedford County
No. 16683 Lee Russell, Judge

No. M2009-00695-CCA-R3-CD - Filed March 5, 2010

The defendant, Gary Moses Brown, entered an open plea of guilty to one count of aggravated assault. *See* T.C.A. § 39-13-102 (2006). The trial court sentenced the defendant to eight years' incarceration to be served consecutively to another sentence unrelated to the instant case. The defendant appeals the length of his sentence, arguing that his sentence is excessive and contrary to law. Discerning no error, we affirm the judgment of the trial court.

Tenn. R. App. P. 3; Judgment of the Circuit Court Affirmed

JAMES CURWOOD WITT, JR., J., delivered the opinion of the Court, in which NORMA MCGEE OGLE and D. KELLY THOMAS, JR., JJ., joined.

Michael J. Collins, Assistant District Public Defender (on appeal and at trial); and Andrew Jackson Dearing, Assistant District Public Defender (at trial), for the appellant, Gary Moses Brown.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; Charles Crawford, District Attorney General; and Michael Randles, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

We glean the facts of the defendant's offense from his January 8, 2009 plea hearing. On July 21, 2008, the defendant assaulted his live-in girlfriend, Deanna Prosser, and displayed a knife during the attack.

> [The assault] arose out of the fact that [the defendant] had apparently been in jail, and he was suspicious that she had

> perhaps cheated on him while he was in jail. He was accusing her of that. And so he hit her several times; he blackened her right eye; he drug her across the floor causing a fairly substantial rug burn on her left arm. . . . He hit her repeatedly with a plastic coat hanger bruising her arms and legs. He displayed a steak knife and then made some superficial cuts on her arm and actually . . . made the observation that perhaps the authorities would think that she had done that to herself. He also choked her to the point that she actually vomited. And then he apparently demanded and she complied in the performing of some sexual activity.

The defendant did not deny these allegations except he maintained that he placed the steak knife in the victim's hand and then held the blade "upside-down" to her wrist "[j]ust to scare her." The defendant acknowledged that this action constituted the offense of aggravated assault.

The trial court held a sentencing hearing on February 20, 2009. The State argued that the defendant should be sentenced as a Range II offender because the defendant had two separate felony convictions that occurred more than a year apart. The State also presented several enhancement factors for the court's consideration including the defendant's extensive criminal record, his failure to comply with terms of community release, and his committing the instant offense while serving probationary sentences for another domestic violence conviction and a vandalism conviction. The presentence investigation report showed "a lengthy felony and misdemeanor record . . . with a history of domestic violence and probation revocations."

The defendant testified that he was "pretty much sure" he had employment secured for after his release from his sentence but that, due to his pretrial incarceration, he "[didn't] know if [he] still [had] it." He testified that he worked for several employers and that he had also "started running [his] own plant."

The defendant admitted having committed two drug-related felony convictions when he was 19 and 20 years old, respectively. He explained, "I done wrong in my past. And I've done time for my past. And from being 19 and 20 years old from my lengthy felony that I've done, you see it's a lengthy felony that I've learned from my mistakes for that." The defendant admitted that he knew that his assaulting the victim "was wrong" and that he "asked God for . . . forgiveness." He also maintained that the victim, who was not present at the hearing, had forgiven him.

The defendant testified that he had three children and that he wanted to "do the right things for [his] kids from this point out." He testified that he learned that he had a fourth child while imprisoned for the instant offense.

On cross-examination, the defendant explained that, while waiting for the disposition of his case, he had worked on the road crew. He said, "And one day it just came to me, like, I've given my life to God." He maintained that he learned to "walk away from [his] problems" and his "old fleshly ways." Regarding his felony convictions, he maintained that he did not know that he was partaking in criminal activity when he committed the drug offenses and that he was "young and dumb" at the time. He did, however, admit having his probation revoked on both cases.

The defendant admitted that he had been placed on probation for assaulting the same victim 15 days before the July 23, 2008 assault. The defendant, explaining the July 23 assault, said, "In a way I did not assault her, actually basically tried to scare her . . . ."

At the close of proof, the State asked for the maximum allowable sentence of 10 years' incarceration in light of the defendant's extensive record and multiple probation revocations. Defense counsel argued that the defendant should serve seven years' incarceration because his criminal record mainly consisted of misdemeanors.

The trial court noted that the sentencing range for a Range II, Multiple Offender was six to 10 years for a Class C felony. The trial court found that the defendant had a previous history of criminal convictions in addition to those necessary to establish the appropriate range. *See* T.C.A. § 40-35-114(1) (2006). The court considered the defendant's 2008 and 2006 domestic violence convictions, his 2007 vandalism conviction, his two 2007 failure-to-appear convictions, his 2007 assault conviction, his 2007 and 2000 public intoxication convictions, and his 2002 aggravated criminal trespass conviction. The trial court also found that the defendant failed to comply with the terms of his release into the community, *see id.* § 40-35-114(8), and noted that he violated the terms of probation for his 2006 domestic violence conviction and for his 1991 and 1992 felony drug convictions. Lastly, the court found that the defendant committed the instant offense while serving probationary sentences for two different convictions. *See id.* § 40-35-114(13).

The trial court found no mitigating factors present. *See id.* § 40-35-113.

The trial court noted that it was authorized, in light of the defendant's record and probation violations, to sentence the defendant to the maximum 10-year sentence; however, the court sentenced the defendant to eight years' imprisonment based on the fact that the defendant's criminal history consisted mostly of misdemeanors.

The court then noted that the defendant was serving the remainder of his sentence for his probation violations which occurred as a result of the instant case. The trial court ordered the defendant to serve his eight-year sentence consecutively to his existing sentence. The court found that the defendant had an extensive criminal record, *see* T.C.A. § 40-35-115(b)(2), and that the defendant was a dangerous offender who showed little regard for human life and no hesitation about committing crime where risk to life is great, *see id.* § 40-35-115(b)(4). The court again noted that the defendant committed the instant offense while on probation for the other offenses. *See id.* § 40-35-115(b)(6).

Finally, the trial court considered whether the defendant should serve an alternative sentence. Defense counsel conceded that alternative sentencing was not appropriate, and the trial court agreed. The court noted that the defendant "shows absolutely no potential for rehabilitation without an . . . extended incarceration." *See id.* § 40-35-103.

The defendant appeals the length of his sentence, stating the weight that the trial court gave to the three enhancement factors "did not comply with the 'purposes and principles' of the [sentencing] act." We wholly disagree.

When a defendant challenges the length of a sentence, this court generally conducts a de novo review of the record with a presumption that the determinations made by the trial court are correct. T.C.A. § 40-35-401(d). This presumption, however, is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). The burden of showing that the sentence is improper is upon the appellant. *Id.* If the review reflects the trial court properly considered all relevant factors and its findings of fact are adequately supported by the record, this court must affirm the sentence, "even if we would have preferred a different result." *State v. Fletcher*, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991). In the event the record fails to demonstrate the required consideration by the trial court, appellate review of the sentence is purely de novo. *Ashby*, 823 S.W.2d at 169.

Our review of the record reflects that the trial court carefully considered all applicable sentencing statutes on the record, and our review is de novo with a presumption of correctness. *See id.* The record shows that the defendant violated two separate probationary sentences when committing the assault that led to the instant case. His long criminal record, although consisting mostly of misdemeanors, belies his testimony that his 1990 and 1991 felony convictions allowed him to "learn[] from [his] mistakes." Every conviction used by the trial court in enhancing his sentence occurred after his "young and dumb" mistakes. In light of the defendant's repeated criminal activity and inability to comply with the conditions of his community sentencing, we cannot say the trial court erred

in sentencing the defendant in the middle of the range for his conviction class. We affirm the judgment of the trial court.

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JAMES CURWOOD WITT, JR., JUDGE